

# NEED TO KNOW

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## NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board (NLRB) is perhaps the most influential actor in private sector labor relations today. Assigned multiple functions from conducting elections for unionization to arbitrating charges of unfair labor practice, NLRB's extensive powers over the private sector reflect the Depression era from which it sprung. Unfortunately, great power and great danger go hand in hand. In recent years, NLRB's decisions have been criticized for favoring labor unions at the expense of businesses and economic growth.

### ORIGINS

As the American economy sunk into the Great Depression, the National Industrial Recovery Act was enacted in 1933, granting private sector workers the right to collectively bargain with their employees (3). Quickly after passage, a National Labor Board was created to protect the Act's bargaining provisions. However, after that board's structure proved ineffective, President Franklin D. Roosevelt abolished it in 1934 and established a three-member National Labor Relations Board in its place. Like its predecessor, the newly created NLRB was quickly stripped of its power after issuing numerous controversial rulings. Finally, in 1935, the National Labor Relations Act was passed solidifying the structure of the NLRB to a five-person adjudicating board. Although the Board's bureaucracy has shifted over the years, abolishing its Economics Division in 1940 for example, the NLRB's basic functions have remained the same.

### FUNCTIONS

Today NLRB performs five basic functions: conducting elections for unionization, investigating charges of unfair labor practice, facilitating settlements of such charges, deciding cases of such charges, and enforcing Circuit Court orders (4). Most of these functions are performed by the NLRB's 32 regional offices. However, administration law case decisions are appealable to NLRB's five-member board in Washington, D.C.

When a workforce is interested in organizing, they must circulate a petition for unionization and present it to their NLRB regional office when 30% of employees sign. After such a requirement is met and the petition is processed, and NLRB regional official conducts an election after waiting period of approximately 30 days in which both pro- and anti-unionization factions can make their case to the workforce. A union must be recognized if more than 50% of the workforce votes in favor.

If a worker, employee, or union believes their rights have been violated under the National Labor Relations Act, they can file an unfair labor practice charge with the NLRB regional office. If the office finds merit with the claim, they notify the charged part and offer an opportunity to settle before proceeding with the charge. NLRB receives 20,000 to 30,000 charges per year, 90% of which are settled before going to court.

The 10% of cases remaining are heard before a NLRB administrative law judge and can be appealed to the Board in Washington, D.C. However, the D.C. Board is not the final arbiter of unfair labor practice charges. All NLRB cases can be appealed to Circuit Court, and ultimately the Supreme Court, and have been overturned numerous times throughout the Board's history.

### QUICK FACTS

- NLRB's national and 32 regional offices process 20,000-30,000 charges of unfair labor practice each year (1)

### NOTABLE & QUOTABLE

"Today, many job creators are being punished for doing business. Confiscatory taxes. Suffocating regulations. Stifling energy costs... Now they must also endure a rogue agency thumbing its nose at an unambiguous and unanimous court ruling. How are they supposed to have the confidence to invest and create jobs?" (2)

**-Bernie Marcus**, co-founder of Home Depot

## BOARD STRUCTURE & QUORUM ISSUES

In theory, the Board consists of five members – three from the President’s party and two from the opposition party. However, the Board has had many periods throughout its history where it was occupied by less than five members and has thereby experienced problems maintaining a quorum. In recent years, the U.S. Supreme Court invalidated the Board’s decisions from December 2007 to March 2009 because it only had two members (5). Most recently, the NLRB’s Quorum from January 2012 was evaluated by the Supreme Court, as the President attempted to make three recess appointments when, according to the D.C. Court of Appeals, the Senate was not actually in recess. The Court ruled that the appointments were unconstitutional, leaving more than a year of rulings invalidated (6).

## CONTROVERSY

NLRB has faced intense scrutiny under the Obama administration for issuing rulings that critics claim overturn years of precedent to favor labor. Such controversial decisions include:

- Ambush elections: In December 2011, the Board issued a final rule eliminating 25-30 day waiting period before a workforce votes whether to unionize. The D.C. District Court of Appeals has since dismissed the rule, but similar cases may surface soon (7).
- Microunions: In September 2011, the Board ruled in Specialty Healthcare that subclasses of workers in a workplace can form “micro-unions,” forcing employers to bargain with several classes of employees simultaneously (8).
- Social media: In December 2012, the Board ruled in Hispanics Unified of Buffalo that companies cannot fire employees for complaining about management online (9).

## CONCLUSION

Although NLRB plays a critical role in enforcing provisions of the National Labor Relations Act, their recent quorum issues and controversial rulings merit reconsideration of the function and organization of the Board.

### Endnotes:

1. “Investigate Charges,” National Labor Relations Board, <http://www.nlrb.gov/what-we-do/investigate-charges>.
2. Bernie Marcus, “The National Labor Relations Board Goes Rogue,” The Wall Street Journal (February 13, 2013), <http://online.wsj.com/article/SB10001424127887324162304578302590637139214.html>.
3. James A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law*: Volume 1(1933-1937) (1974).
4. National Labor Relations Board, <http://www.nlrb.gov>.
5. “Supreme Court Invalidates Decisions Made by Two-Member NLRB Panel,” Constangy, Brooks & Smith, LLP (June 17, 2010), <http://www.constangy.com/firm-news-135.html>.
6. Recess appointments [https://www.washingtonpost.com/politics/supreme-court-rebukes-obama-on-recess-appointments/2014/06/26/e5e4fef-a831-11e3-a86b-362fd5443d19\\_story.html](https://www.washingtonpost.com/politics/supreme-court-rebukes-obama-on-recess-appointments/2014/06/26/e5e4fef-a831-11e3-a86b-362fd5443d19_story.html)
7. “NLRB Watch: NLRB’s ‘Ambush’ Election Rule Invalidated... At Least for Now,” National Right to Work Legal Defense Foundation, <http://www.nrtw.org/en/nlrb-watch/nlrb-watch-nlrb-s-ambush-election-rule-invalidated>.
8. “Specialty Healthcare and Rehabilitation Center of Mobile” (August 26, 2011), National Labor Relations Board, <http://www.nlrb.gov/case/15-RC-008773>.
9. Hispanics United of Buffalo (December 14, 2012), National Relations Board <http://mynlrb.nlrb.gov/link/document.aspx/09031d4580e8c5f4>.

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